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No. 638

In the

Supreme Court of the United States

OCTOBER TERM, 1960

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION NO. 745,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

L. N. D. WELLS, JR.,
1601 National Bankers Life Building,
Dallas 1, Texas.

DAVID PREVIANT,
Warner Theatre Building,
Milwaukee 3, Wisconsin.

HERBERT S. THATCHER,
Tower Building,
Washington, D. C.,
Attorneys for Petitioner.

WARLICK LAW INC —2263 VALDINA STREET—DALLAS— RI 1-6711

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1.

The Petition is Timely

The Judgment of the Court of Appeals entered August 18, 1960, modified the Order of the NLRB to proscribe narrowly only certain actions directed towards three named enterprises (Slip Opinion, pp. 6-7). After the respondent, by motion for rehearing, induced the Court to reconsider its

original Judgment, the Opinion on Rehearing of October 13, 1960, and the Decree of November 14, 1960, constituted a "reinstating and enforcing [of] certain provisions of the Board's Order which had been deleted by the original decision of August 18, 1960 * * *." Decree of November 14, Petition App. C, at p. A-10.

This constituted substantial revision of the petitioner's legal obligations, which by the prior judgment had been much more narrowly defined. It was not until the Court's entry of the broad proscription that there was such extensive deprivation of petitioner's rights as to require petition for certiorari. Whether the effective date of such judgment is October 13 (the date of the Opinion on rehearing, Petition, App. B, pp. A-7, 8), or November 14 (the date of the "Decree Enforcing * * *" Petition, App. C, pp. 9-11), the instant petition was timely.

2.

The case presents law questions. We agree that resolutions of particular fact questions adversely to petitioner does not present issues appropriate for review by this Court. Opposition, page 8ff.

But here we are not concerned with credibility questions, or the validity of fact findings. *The facts are stipulated.* Record pp. 35-70. App. to Bd. Brief, Ex. 2, pp. 1-24. The questions are not factual—rather the basic law question is posed: whether upon stipulated facts the Board may conclude as a matter of law that the stipulated facts amount to a violation of the statute.

The Opposition's assertion that there is no substance to our contention of conflict in this area of the law is belied by an opinion of the Board, rendered since the instant petition was filed. *Retail, Wholesale & Department Store Union (Perfection Mattress & Spring Co.), 129 NLRB No. 125, 47 LRRM 1121 (December 28, 1960)*. That case is the sequel to *Rains (C. A. 5), 266 F. 2d 503* and *United Wholesale (C. A. D. C.), 282 F. 2d 824*, in which the two Circuits on identical stipulated facts reached opposite conclusions. See our petition for a Writ of Certiorari, pp. 13-17. After the District of Columbia Circuit refused to enforce the Board's Order, "* * * the union again began picketing * * *. The picketing was conducted in essentially the same manner as before." *47 LRRM 1121*. While enjoining the picketing for a second time, the Board (Member Fanning dissenting) noted the Court of Appeals for the District of Columbia had set aside the earlier order, but stated it was "not entirely clear on what point the majority of the Court disagrees with the Board" and "we must, with all due respect to the Court, disagree with its interpretation of the Act and adhere to the position set forth in the Board's previous decision * * *." *Ibid.* The Board thus aligns itself with the Fifth Circuit's view and continues to disagree with the interpretation of the Act made by the Court of Appeals for the District.

Compare the assertion (Opposition p. 8) that for Supreme Court purposes the question is wholly factual, with the rationale of the Board's decisions which speak in terms of "interpretation of the Act".

4.

This Court has granted certiorari this term in No. 321 where it will be decided whether a striking union violated Section 8(b)(4)(A), the very section here at issue, by picketing a primary employer's premises at a gate reserved for use of others working on the primary employer's premises. *Local 761, International Union of Electrical etc. Workers, AFL-CIO v. NLRB and General Electric Company.* Determination that the conduct there in issue is lawful must result *a fortiori* in validation of the instant picketing. While to a great extent the considerations involved in the two cases are similar (and perhaps should be tested by consolidated argument of the two cases) yet even if the picketing there be held unlawful, there remains statutory and constitutional protection for the primary picketing in which this petitioner engaged.

WHEREFORE, petitioner prays that its petition for certiorari be granted.

Respectfully submitted,

L. N. D. WELLS, JR.,
1601 National Bankers Life Building,
Dallas 1, Texas.

DAVID PREVIANT,
Warner Theatre Building,
Milwaukee 3, Wisconsin.

HERBERT S. THATCHER,
Tower Building,
Washington, D. C.,
Attorneys for Petitioner.

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